Supreme Court, U.S.
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No. 10-_____

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In The

Supreme Court of the United States

BRIAN S. ZAHN,

Petitioner,

v.

JOHN McHUGH, Secretary of the Army,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an adverse employment action taken without due process mandate reversal?

2. In what circumstances is a plaintiff entitled to a "mixed-motive" jury instruction?

PARTIES

The petitioner is Brian Steven Zahn, former employee of 20 years with the Army Corps of Engineers at Chief Joseph Dam Project.

The respondent, John McHugh is Secretary of the Army.

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Petitioner Brian Zahn respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Ninth Circuit Court of Appeals entered on March 31, 2010.

OPINIONS BELOW

The Memorandum of the United States Court of Appeals for the Ninth Circuit, filed March 31, 2010 is included in the Appendix at App. 1. The United States District Court's December 31, 2008, "Findings of Fact and Conclusions of Law" is also included in the Appendix at App. 4.

STATEMENT OF JURISDICTION

The Court of Appeals accepted jurisdiction under 28 U.S.C. § 1291 and its opinion was entered on March 31, 2010. A timely petition for rehearing was denied on July 21, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254[1] and by virtue of Article III of the United States Constitution and Title 28 Part IV Chapter 85 Section 1331, Federal question:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

STATUTES INVOLVED

5th Amendment to the Constitution provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

14th Amendment to the Constitution provides:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ADA, The American Disabilities Act 42 U.S.C. § 12112 provides:

> (4) Examination and inquiry
>
> (A) Prohibited examinations and inquiries
>
> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity

42 U.S.C. § 12112[4][d][3][B] mandates:

> (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is

treated as a confidential medical record, except that –

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request;

42 U.S.C. § 12114 provides:

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who –

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

WLAD Washington State Law against Discrimination RCW 49.60.030 *et seq.*

> RCW 49.60.030 Freedom from discrimination-Declaration of civil rights.
>
> [1] The right to be free from discrimination because of . . . the presence of any sensory, mental, or physical disability . . . is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> [a] The right to obtain and hold employment without discrimination:

Washington State Law WPI 330.05 Employment discrimination-Retaliation Washington Pattern Jury Instruction 6A WAPRAC WPI 330.05 provides:

> To establish a claim of unlawful retaliation by [defendant], [plaintiff] has the burden of proving each of the following propositions:
>
> [1] That [plaintiff] was opposing what he reasonably believed to be discrimination on the basis of [disability] [participating in a proceeding to determine whether discrimination or retaliation had occurred; and
>
> [2] That a substantial factor in the decision to terminate was the plaintiff's opposition to what he reasonably believed to be discrimination or retaliation in a proceeding to determine whether discrimination or retaliation had occurred.
>
> If you find from your consideration of all of the evidence that each of these propositions

has been proved, that your verdict should be for [plaintiff].

Title 28 Part IV Chapter 85 Section 1331, Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States

5 CFR § 752.401 Coverage.

(a) *Adverse actions covered.* This subpart applies to the following actions: (1) Removals; (2) Suspensions for more than 14 days, including indefinite suspensions;

(c) *Employees covered.* This subpart covers: (2) An employee in the competitive service who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

§ 752.404 Procedures.

(a) *Statutory entitlements.* An employee against whom action is proposed under this subpart is entitled to the procedures provided in 5 U.S.C. § 7513(b).

5 U.S.C. § 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to –

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefore at the earliest practicable date.

§ 752.404 Procedures, further provides:

(f) *Agency review of medical information.* When medical information is supplied by the employee pursuant to paragraph (c)(3) of this section, the agency may, if authorized, require a medical examination under the criteria of §339.301 of this chapter, or otherwise, at its option, offer a medical examination in accordance with the criteria of §339.302 of this chapter. If the employee has the requisite years of service under the Civil Service Retirement System or the Federal Employees' Retirement System, the agency must provide information concerning disability retirement. The agency must be aware of the

affirmative obligations of the provisions of 29 CFR 1614.203, which require reasonable accommodation of a qualified individual with a disability.

(g) *Agency decision.* (1) In arriving at its decision, the agency will consider only the reasons specified in the notice of proposed action and any answer of the employee or his or her representative, or both, made to a designated official and any medical documentation reviewed under paragraph (f) of this section.

(2) The notice must specify in writing the reasons for the decision and advise the employee of any appeal or grievance rights under §752.405 of this part. The agency must deliver the notice of decision to the employee on or before the effective date of the action.

STATEMENT OF THE CASE

LACK OF DUE PROCESS

Defendants held a medical inquiry on Friday, January 5, 2001 regarding the plaintiff, and on Sunday, January 7, 2001 emailed "Do-Not-Report-To-Work" orders to the plaintiff placing him on a never-to-be-rescinded indefinite leave, effectively terminating plaintiff's 20 year career without providing the due process protections ["*Loudermill rights*"] guaranteed by the Collective Bargaining Agreement and by statutory authority 5 CFR 752 and by the 5th and 14th Amendments to the United States

Constitution as interpreted by the Supreme Court in the landmark decisions of *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), and *Mathews v. Eldridge*, 424 U.S. 319 (1976).

This case does not concern any question of discipline, its primary concern is retaliation.

PRESENTATION AND CASE PROCESSING OF DUE PROCESS

Court Record #13, *Plaintiff's 1st Amended Complaint*, pps. 3-4, specifically name the "Do-Not-Report-to-Work" instructions [App. 31-33], the January 10, 2001 bad faith agreement between management and the union [App. 37], and *due process*. Court Record #201, *Plaintiff's Pretrial Order Filing*, page 16, point 5., and point 6., present issues of law to be decided by the court at trial, and state, " . . . *Defendants failed to provide the due process protections* guaranteed by the CBA . . . ", And "Defendant's issuance of the "Do-Not-Report-to-Work" instructions . . . were an adverse action by definition of 5 CFR 752.301 and *defendants failed to provide the due process protections to plaintiff* guaranteed by Cause and Procedure Section 7513[a] and Section 7513[b].

Petitioner presented at trial:

> *"5 CFR 752 also defines adverse actions as an enforced suspension under two conditions, under less than 14 days and over 30 days.*
>
> *It provides cause and procedure under CFR 752. That employee[s] against whom an*

> *action is proposed is entitled to at least 30 days advance written notice, to be represented by an attorney or other representative and a written decision and the specific reasons therefore at the earliest practicable date.*
>
> *I'm asserting that as the do-not-report-to-work instructions were an adverse action by definition – by definition of both the collective bargaining agreement and the controlling regulations, that the defendants were negligent in providing the plaintiff the necessary due process requirements. I'm also asserting that this negligence was intentional based on discriminatory animus and reprisal."* [*Transcript of Bench Trial Proceedings-Day One*, page 122]

The district courts' December 31, 2008, Findings of Fact and Conclusions of Law, [App. 4-13] did not address plaintiff's assertion of defendant failure to provide due process.

Petitioner's Appeal [Appeal No. 09-35043] to the Ninth Circuit Appellate Court, stated, on page 4:

> "Appellant asserts that the district court's findings of fact and conclusions of law ignore plaintiff's evidence and contradict Ninth Circuit precedent. The district court's 31 December 2008, "FINDINGS OF FACT AND CONCLUSIONS OF LAW", found;
>
> *"There is no evidence that anyone participating in the decision to issue this instruction was motivated by discriminatory bias or retaliatory animus relating to Mr. Zahn's*

EEOC complaints and workplace grievances." [page 3, paragraph 3.].

Appellant asserts the district court's statement is clear error.

The Ninth Circuit Model Jury Instructions provide:

> For the plaintiff to establish retaliation in violation of the ADA, the plaintiff must prove the following elements by a preponderance of evidence:
>
> 1. the plaintiff [engaged] [was engaging] in conduct protected under the ADA;
>
> 2. the plaintiff was subjected to an adverse employment action at the time, or after, the protected conduct occurred;
>
> 3. [there was a causal link between the protected activity and the adverse employment action]; and
>
> 4. [the plaintiff's protected activity was a [motivating factor] [sole or exclusive reason] in the adverse employment action.]

Relative to the Model Jury instructions above:

1.] The defense admits that plaintiff was engaged in protected activity.

2.] The defense cannot reasonably claim that the plaintiff was not subjected to an adverse action. The "Do-not-report-to-work"

> instructions were an unilateral indefinite enforced suspension that were never rescinded. Article 3.1 of the CBA defines an adverse action as, "Disciplinary or adverse action includes written reprimand, suspension, involuntary reduction in grade or pay, removal, or enforced leave." The CSRA also defines an indefinite suspension as an adverse action ***that mandates procedural due process protections under 5 CFR 752***." [emphasis supplied]

The March 31, 2010 Memorandum [App. 1-3] of the Court of Appeals for the Ninth Circuit did not address the appellant's assertion [above] that defendants failed to provide due process. The appellate courts' denial of petitioner's request for rehearing and order precluding further filings [App. 14] necessitated this petition for writ of certiorari.

ARGUMENT FOR ALLOWANCE OF THE WRIT

The Supreme Court Rules, Rule 10, provides in relevant part:

> (a) a United States court of appeals has . . . so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . .

At trial, Petitioner demonstrated a property interest [App. 50-54] in continued employment and

was therefore entitled to the due process protections specified by the CBA and commonly acknowledged as "*Loudermill rights*" which were negligently or intentionally denied by defendants.

Petitioner raised this issue in his Complaint and *First Amended Complaint*, *Plaintiff's Pretrial Order Filing*, made presentation at trial and with his appeal to the appellate court, only to be continuously ignored, thereby deprived of his cherished constitutional right to due process as the Supreme Court has interpreted that right by its rulings in *Loudermill*, and *Mathews*.

The Ninth Circuit Appellate Court has denied plaintiff's request for rehearing and denied any further filings. Therefore, a petition for writ of certiorari to The United States Supreme Court is the only means available for redress of this violation of constitutional rights.

REASONS FOR GRANTING THE WRIT

1. The Appellate Court has propagated district court errors regarding the exceedingly important constitutional right of Due Process in direct conflict with longstanding relevant landmark decisions of the Supreme Court.

Petitioner believes this a straightforward issue where the District Court misapprehended an issue of law and the Appellate Court overlooked the issue on review and summarily denied a request for rehearing.

> ***"Constitutional provisions for the security of person and property should be liberally construed. It is the duty of the courts to be watchful of constitutional rights against any stealthy encroachments thereon." Boyd v. U.S., 116 U.S. 635 [1886].***

Something is very wrong when a plaintiff brings a complaint that repeatedly raises a due process claim, yet, is ignored by a federal court contrary to the United States Supreme Court holdings in the landmark decisions of *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), where *Loudermill* defined what due process was required for a demonstrated property interest and *Mathews* established what has become known as the "Mathews Balancing test" for deciding what process is due when procedural due process applies that balance; [(1) the government's interests, (2) the individual's interest, and (3) the likelihood of making an inaccurate decision using the existing procedures and probable value of additional procedural safeguards].

The U. S. Supreme Court ruled in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985), that,

> *"It is well settled that "the root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Although the pre-termination hearing*

> *need not be elaborate, "some kind of hearing" must be afforded the employee prior to termination. The essential requirements of this pre-termination process are notice and an opportunity to respond."*

The U. S. Supreme Court further held in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) that; *"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."*

Plaintiff established a property interest by introducing into evidence at trial the relevant parts of the Collective Bargaining Agreement specific job protection guarantees [App. 50-54]; of termination only for "cause", advance notice of the reason and *proposed* action, and opportunity to respond. Plaintiff further pointed out the federal statutes that protect a federal employee as 5CFR752 which mirror these due process protections and specify the procedures intended to provide "*Loudermill rights*" to the federal employee. **The district court erred by failing to address plaintiff's assertions of defendant's failure to provide procedural due process** as provided by the CBA and mandated by federal statutory authority. **The appellate court's opinion did not address plaintiff's assertion of lack of due process.**

Plaintiff further asserts that ***the appellate court opinion applied the wrong standard of review*** by using a clearly erroneous or abuse of discretion standard where **de novo review** was called for, per the Ninth Circuit Standards of Review, for a question of constitutional right:

> "A district court's determinations on mixed questions of law and fact that implicate constitutional rights are reviewed de novo."

2. The District Court failed to provide a Mixed-Motive jury instruction pursuant to Washington State Law WPI 330.05

Petitioner asserts the district court erred by disallowance of plaintiff's request for a mixed motive jury instruction for his cause of action for retaliation under Washington State Law and that this error was exceedingly prejudicial as it was case determinative.

The District Court subsumed Washington State Law, WLAD by failing to separate the burden of proof required for a Washington State jury instruction for retaliation from the Ninth Circuit's Model Jury Instruction. The district court did not differentiate between Federal and State law and failed to acknowledge the two very different standards for the burden of proof for jury instructions regarding retaliation. This was case dispositive prejudicial error.

At trial [App. 17-19] Plaintiff explained the difference between the burden of proof for the State and federal retaliation cause[s] and asked for a

motivating factor Washington State jury instruction pursuant to WPI 330.05, Washington State Pattern Jury Instructions, which provides in relevant part,

> "To establish a claim of unlawful retaliation by [defendant], [plaintiff] has the burden of proving each of the following propositions:
>
> [1] That [plaintiff] was opposing what he reasonably believed to be discrimination on the basis of [disability] [participating in a proceeding to determine whether discrimination or retaliation had occurred]; and
>
> [2] That a substantial factor in the decision to terminate was the plaintiff's opposition to what he reasonably believed to be discrimination or retaliation in a proceeding to determine whether discrimination or retaliation had occurred.
>
> If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for [plaintiff]."
>
> Notes for this instruction provide, "An individual asserting a claim under this provision must prove a retaliatory motive was a "substantial factor" in the challenged decision, but need not prove it was the only factor or a "determining factor." *This element can be met by establishing that "the employee participated in an opposition activity, the employer knew of the opposition activity, and the employee was discharged."* [Under Washington State Law petitioner met each of these

> points, participated in protected activity, employer knew of the activity, and the employee was discharged].

WPI 330.05 further provides:

> "A discharge will support an award of damages when [1] the employee engaged in a statutorily protected activity, [2] an adverse employment action was taken, and [3] the statutorily protected activity was a substantial factor in the employer's adverse employment decision."

The Appellate Court's ruling [or lack thereof] was contrary to the Ninth Circuit's Standards of Review, which provides:

> "Any interpretation of state law is reviewed de novo."

And the Standards of Review further provides:

> "When the claim is that the trial court misstated the elements that must be proved at trial, the reviewing court must view the issue as one of law and review the instruction de novo. *See Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1052 n.11 (9th Cir. 2004)."

And, the Ninth Circuit's Standards of Review, further provides:

> The district's court's allocation of the burden of proof is a conclusion of law reviewed de novo. *See Molski v. Foley Estates Vineyard and Winery, LLC*, 531 F.3d 1043, 1046 (9th

> Cir. 2008); *Ferrari, Alvarez, Olsen & Ottoboni v. Home Ins. Co.*, 940 F.2d 550, 555 (9th Cir. 1991).

Petitioner asserts the district court erred by disallowance of a mixed-motive jury instruction for plaintiff's cause of action for retaliation under Washington State Law and that this error was case dispositive and therefore prejudicial in the extreme.

Petitioner further asserts that the district court erred by its failure to directly address and rule on plaintiff's causes of action under the ADA. The district court's ruling at trial allowed the cause of action [App. 18-19] And the district court's Findings of Fact and Conclusions of Law, found "7. *The instruction not to return to work, together with the necessary dissemination of that instruction to appropriate personnel at the work-place, spawned rumors. Mr. Zahn was emotionally impacted by both the instruction and the rumors.*" [App. 8]

Petitioner challenged this finding with his appeal to the Ninth Circuit with,

> "Appellant asserts clear error on the part of the district court.
>
> The 1/5/01 medical inquiry conducted by the defendants and the resultant "Do not report to work" instructions issuance clearly violated 42 USC 12112[a] and 42 USC 12112[d][4][A] by not constraining that medical inquiry to that which was "job related and consistent with business necessity". And

> violated 42 USC 12112[d][4][C] by not constraining plaintiff's confidential information to the requirements mandated by the statute. 42 USC 12112 provides:
>
> **(4) Examination and inquiry**
>
> **(A) Prohibited examinations and inquiries**
>
> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry **is shown to be job-related and consistent with business necessity**. [emphasis supplied]"

The Appellate Court did not address plaintiffs above assertion that a cause of action for retaliatory violation of medical confidentiality and a medical inquiry that went beyond being "job related and consistent with business necessity" was a cause of action and that the evidence proved liability.

42 U.S.C. § 12112[4][d][3][B] mandates the following restrictions of information to a short list of specific entities for specific reasons:

> (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that –

> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> (iii) government officials investigating compliance with this chapter shall be provided relevant information on request;

The defendants' violations of 42 U.S.C. § 12112[4][d][3][B] was egregious and should shock the conscience of a jurist. The Project Engineers' notes of the time [App. 28-30] evidence confidential information was provided to the sheriff's office, an armed guard, the union, and even plaintiff's daughters in-laws, [Mr. and Mrs. Cy Jones], none of which are permitted by the above statute. The immediate resultant damages were: rumors plaintiff was fired damaged plaintiff's professional reputation [App. 30], and the bad faith agreement that gave up plaintiff's UPTO union support for plaintiff's protected activity in trade for managements' support of a medical retirement. [App. 37-38] These violations were so blatant and so destructive that to ignore them as a cause of action utterly defeats the purpose of the law.

The District Court erred by ruling the Reynolds affidavit [App. 38-43] hearsay.

This affidavit should rightly have been declared admissible as a party admission pursuant to F.R.E. 801[d][2][A] and/or [B] and admissible as substantive evidence.

The district court's ruling [App. 18-22] was extremely prejudicial because the **Reynolds affidavit is literally a confession of illegal motive and therefore case dispositive.** Mr. Reynolds signed and sent the January 7, 2001 "Do-Not-Report-To-Work" instructions which are the prime subject of plaintiff's cause of action, and with this notarized affidavit Mr. Reynolds repudiates the reason provided within those instructions as pretext. As the defendant manager in charge who signed the complained of instructions Mr. Reynolds must be seen to be a party opponent and that the plaintiff's submission of this affidavit as substantive evidence under F.R.E. 801[d][2][A] and/or [B] was proper as a statement of a party against their own interest and/or as a statement of a party representative in his *individual* or representative capacity which he has come to believe. The plain language of the rule states:

> **F.R.E. 801(d) Statements which are not hearsay.**
>
> A statement is not hearsay if –
>
> > (2) *Admission by party-opponent.* The statement is offered against a party and is

> (A) the party's own statement, in either an individual or a representative capacity or
>
> (B) a statement of which the party has manifested an adoption or belief in its truth,

And, **NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES**, provides, (2) *Admissions.* Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

> (A) A party's own statement is the classic example of an admission. If he has a

> representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent affairs.

Petitioner further offers clarification that the 1997 Amendment to Rule 801(d)(2) regarding *Bourjaily v. United States*, 483 U.S. 171 (1987) is **not** relevant to petitioner's assertion here, in that *Bourjaily* is inapplicable to F.R.E. 801[d][2]**[A]**, but does apply the 1997 amendment to F.R.E. 801[d][2]**[C]**, as regards conspiracy and criminal law.

The district court's 31 December 2008, "FINDINGS OF FACT AND CONCLUSIONS OF LAW", found:

> *"There is no evidence that anyone participating in the decision to issue this instruction was motivated by discriminatory bias or retaliatory animus relating to Mr. Zahn's EEOC complaints and workplace grievances."*

Petitioner asserts the district courts' finding was clearly erroneous.

Plaintiff presented the following evidentiary proof which he asserts as the preponderance of evidence:

Temporal Proximity

Plaintiff's 12/15/00 EEOC complaint [App. 25-26] named his immediate supervisor, his 2nd line supervisor, and the Seattle District HR person [Mssrs. Skibby, Reynolds, and Conover] for retaliatory interference of plaintiff's OWCP claim. *Just 21 days later*, [with the Christmas and New Year holidays intervening] these same respondents initiated, participated and controlled the "medical inquiry", and the results thereof, issuance of the "Do-Not-Report-To-Work" orders of Sunday, January 7, 2001.

CAT'S PAW

Respondent Conover called the 1/5/01 "medical inquiry", set it a "high priority", and chose the specific attendees. Nine individuals are named recipients to the email and plaintiff's 1st and 2nd line supervisors, Mr. Skibby and Mr. Reynolds are listed. [App. 27] Mr. Reynolds kept a journal recording his observations surrounding the "medical inquiry". [App. 28-30] Mr. Reynolds' notes show that the medical inquiry amounted to unsubstantiated gossip led by Mr. Conover and Mr. Reynolds and this gossip alone was apparently the sole basis for the 7 listed actions immediately decided. [App. 28] The Number 1 priority was "Immediately stop Brian [plaintiff] from coming back onto the Project."

With *Poland v. Chertoff*, 05-35508 [9th Cir. 2007] the Ninth Circuit held:

> ***"In summary, we hold that to establish the essential element of causation in a subordinate bias case – where the investigation that led to the adverse employment decision was initiated by, and would not have happened but for, the biased subordinate – the plaintiff must show that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or the investigation leading thereto."*** *Citing Bergene,* 272 F.3d at 1141.

With the instant case, the district court inconsistently found no causal connection even though the plaintiff provided the citation and read the above associated 9th cir. holding at trial. Petitioner asserts that, with the above evidence and case law, he proved the single motive, the "but for" causation requirement for his federal cause of retaliation.

DIRECT EVIDENCE

> *"Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption."* Godwin, 150 F.3d at 1221

Plaintiff provided direct evidence of illegal retaliation. Ed Reynolds' January 10, 2001 email [App. 37-38] details the bad-faith agreement between defendants and the union to trade off union support

of plaintiff's protected activity for management support of medically retiring him without advising or consulting the plaintiff. Also, proof of pretext is provided with the comment at the bottom where the defendants' erroneous belief of a substance abuse problem was advised to be hidden.

The Skibby/Reynolds 1/10/01 email dialogue [App. 36] is clearly direct evidence of retaliatory motivation for protected activity where supervisor Skibby suggests in addition to the above bad-faith agreement, *"Should both grievances, both Unfair Labor Practices [not filed through UPTO], the EEO appeal [not filed through UPTO], and any future actions from Mr. Zahn be a part of this agreement?"* And in response, Mr. Reynolds replies, *"Oops! Yes we talked about that at the meeting. Once Brian is no longer an employee, UPTO will drop all that nonsense."*

PROOF OF PRETEXT

The Project Engineer's notes [App. 28] clearly show the decision making process surrounding the issuance of the "Do-Not-Report-To-Work" orders do not even mention the non-discriminatory reason later provided to justify issuance of these orders. Clearly, the plaintiff's Doctors' letters [App. 31] were an after-the-fact pretextual excuse to hide illegal motive.

At this point in time when issuance of the "Do-Not-Report-To-Work" orders was decided, the defendants negligently abrogated plaintiff's due process

rights even though they knew or should have known of plaintiff's rights pursuant to the CBA by virtue of the positions of authority and designated responsibility that they held as evidenced by Reynolds' 1/8/01 email to UPTO president concerning their participation in union/management contract negotiations concurrent with Reynolds copying the union official with the "Do-Not-Report-To-Work" orders.

Petitioner has a demonstrated property interest by virtue of the CBA [App. 50-54] which mandated the procedural due process protections of the CBA, 5 CFR 752, "*Loudermill rights*" and implementation of the "*Mathews balancing test*".

Mr. Conover's 1/9/01 email [App. 34] indicates his familiarity with the statutory requirements. He quotes Dr. Frese' statement that the plaintiff " . . . would not be a danger to himself OR to others." Which obviated the lack of the "direct threat" defense provided by 29 CFR § 1630.2 and acknowledged by this court in *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73 (2002). Mr. Conover's demonstrated familiarity provides evidence from which a reasonable jurist could infer pretext.

That the defendants *knew* that the reason provided for issuance of the "Do-Not-Report-To-Work" orders [plaintiff's Doctors' statements] was insufficient against the statute, but used that reason anyway, infers pretext.

In no regard whatsoever does the reason provided by the defendants account for the *immediate*

issuance of "Do-Not-Report-To-Work" orders. There was no emergency. Pursuant to the *Mathews* Balancing test, the defendants had no proper, reasonable, or legitimate justification, just pretext.

The nail in the coffin for pretext in this case is that the defendants took pains to hide their concern that plaintiff had a drug and alcohol problem. The evidence shows alcohol and drugs are mentioned per the project engineer's notes [App. 28] coincident with the decision to issue the "Do-Not-Report-To-Work" orders, and again with Ed Reynolds' 1/10/01 email, at the bottom he states, *"Also Ray suggested that it would be to Management's advantage to be unaware of any drinking or drug problems as we process the medical retirement."* [App. 38]

And Mr. Reynolds states in his affidavit,

> *"He [Zahn] was discriminated against largely because agency* ***management wrongfully believed that he had a drug and alcohol problem****. As my personal notes of that time in early January of 2001 record, a telephonic conference was held regarding Mr. Zahn. In attendance at that conference were many of the agency department heads from both the Seattle District offices and Chief Joseph Dam. There was conjecture of workplace violence based upon Mr. Zahn's diagnosed stress condition and supposed substance abuse problem. Although I stated at the time that there was no basis for such concern and that no threats or actions gave any such indication of potential workplace violence, the*

consensus of the group was to deny Mr. Zahn access to the project. My boss, Brian Applebury suggested that we make use of Mr. Zahn's doctor's letters by interpreting those letters in such a way as to justify issuing orders to Mr. Zahn not to come back to work. Obviously, I was not in a position to argue with my boss so that is what was done. Mr. Zahn was not provided the agency's real reasons for the issuance of the "do-not-report-to-work" instructions and he was not given an opportunity to respond to any of these charges against him, nor was he represented by anyone."

CONCLUSION

Due process is the fundamental basic concept of fairness. Due process requires that the aggrieved be provided the reason for a proposed action and a meaningful opportunity to respond at a meaningful time. Due process must also necessarily require that a court of law address the causes of action and the relevant evidence put before it. Petitioner has been denied due process.

Petitioner believes the Constitution a divinely inspired document and worthy of defending. He has spent the last ten years in a fight for justice. This filing alone represents approximately 1/7th of his expected year's income, yet, " . . . and justice for all" still echoes in his ears.

What do we learn here?

If one looks at the overall picture from the standpoint of human nature some things begin to make sense. Unfortunately we live in a culture of fear. It seems generally that people hit back. And they don't wait. This is why the temporal proximity of things allows the inference that these events are tied together. A manager who learns that he has been named in a complaint must feel that his integrity has been challenged, like he was hit, and he looks to hit back. But, with the passage of time that person will tend to come to understand that what happened wasn't really a personal attack. And this fits nicely with the due process protections that in its wisdom the Supreme Court has provided for us by interpreting the Constitution to produce the very sensible and utilitarian opinions given in *Loudermill* and *Mathews*.

If the petitioner had been provided due process protections in this case no mistaken adverse action would have been made based on gossip. With due process petitioner would have been advised of the real reasons and given an opportunity to respond. He would have provided documentary proof [App. 46-49] that the decision makers' concerns were unfounded and no adverse action would have taken place.

Loudermill and *Mathews* are good law and this court should proactively guard against their erosion. Due process is a vital part of the Constitution and a cherished right of the people.

Respectfully submitted,

BRIAN S. ZAHN, pro se
P.O. Box 535
Bridgeport, WA 98813
[509] 686-7851

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRIAN ZAHN, Plaintiff-Appellant, v. JOHN McHUGH,* Secretary of the Army, Defendant-Appellee.	No. 09-35043 D.C. No. 2:03-cv-00356-EFS MEMORANDUM** (Filed Mar. 31, 2010)

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Submitted March 16, 2010***

Before: SCHROEDER, PREGERSON, and RAWLINSON, Circuit Judges.

Brian Zahn appeals pro se from the district court's judgment for defendant following a bench trial in his action alleging retaliation in violation of Title

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* John McHugh is substituted for his predecessor, Francis J. Harvey, as Secretary of the Army, pursuant to Fed. R.App. P. 43(c)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

*** The panel unanimously concludes this case is suitable for decision without oral argument. Accordingly Davenport's request for oral argument is denied.

VII, the Americans with Disabilities Act ("ADA"), the Rehabilitation Act ("RA") and the Washington Law Against Discrimination ("WLAD"). We have jurisdiction under 28 U.S.C. § 1291. We review for clear error the district court's factual findings as to retaliatory intent, *Jauregui v. City of Glendale*, 852 F.2d 1128, 1131 (9th Cir. 1988), and for abuse of discretion its evidentiary rulings, *Janes v. Wal-Mart Stores, Inc.*, 279 F.3d 883, 886 (9th Cir. 2002). We affirm.

The district court did not clearly err by finding that Zahn failed to prove that the instruction that he not return to work was motivated by any protected status under Title VII, the ADA, the RA or the WLAD. *See Lam v. Univ. of Haw.*, 40 F.3d 1551, 1565-66 (9th Cir. 1994) (holding that the district court's finding of no discrimination under Title VII was not clearly erroneous because the finding was supported by the record); *Snead v. Metro. Prop. & Cas. Ins. Co.*, 237 F.3d 1080, 1093 (9th Cir. 2001) (holding Title VII analysis applies in ADA case); *Coons v. Sec'y of U.S. Dep't of Treasury*, 383 F.3d 879, 884 (9th Cir. 2004) (recognizing standards to determine discrimination are the same under the RA and the ADA); *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065-66 (9th Cir. 2003) (recognizing the same analysis applies under the WLAD and Title VII).

The district court did not abuse its discretion by denying the admission at trial of affidavits Zahn contends supported his case. *See* Fed. R. Evid. 801(c) and 804(a); *cf. Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 713 (9th Cir. 1992) (explaining that, to

be admissible under Fed. R. Evid. 804, affidavits require more an oath alone to guarantee the trustworthiness of the affiant). The district also did not abuse its discretion by admitting letters from Zahn's physician and psychologist. *See Chuyon Yon Hong v. Mukasey*, 518 F.3d 1030, 1034 (9th Cir. 2008) (explaining that the exclusionary rule "is an exceptional remedy ally reserved for violations of constitutional rights" in criminal cases) (citations and internal quotation marks omitted); *cf. Haddad v. Lockheed Cal. Corp.*, 720 F.2d 1454, 1456 (9th Cir. 1983) (holding evidence properly admitted as non-hearsay during trial in a Title VII action to show non-discriminatory intent).

We decline to consider Zahn's contentions concerning the district court's denial of his motion to amend his complaint to conform to the evidence at trial concerning a possible cause of action for constructive discharge. Zahn has provided no citations to the record permitting any determination as to whether or not such an amendment was warranted. *See Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9th Cir. 1991) (dismissing appeal of pro se appellant who did not ensure that the court had a complete trial transcript to enable review of his contentions).

Zahn's remaining contentions are unpersuasive.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRIAN ZAHN,

Plaintiff,

v.

DR. FRANCIS HARVEY,
Acting Secretary,
Department of Army,

Defendant.

NO. CV-03-0356-EFS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A bench trial was held in the above-captioned matter on October 27 and 28, 2008. Plaintiff Brian Zahn proceeded pro se; Assistant United States Attorney Andrew Biviano represented Defendant Dr. Francis Harvey, Acting Secretary of the Department of the Army. Mr. Zahn testified and also called four witnesses (Melanie Johanns, Jessica Jones, Dr. Glen Frese, and John Skibby) to support his Title VII, Americans with Disabilities Act (ADA), Rehabilitation Act (RA), and Washington Law Against Discrimination (WLAD) retaliation claims. Following Mr. Zahn's case, Defendant elected not to call witnesses. The Court took the matter under advisement and, after considering the legal standards and evidence presented, concludes that Mr. Zahn failed to carry his burden to prove these claims by a preponderance of the evidence. Accordingly, based on the Findings of Fact and Conclusions of Law set out hereafter, the Court finds for Defendant.

FINDINGS OF FACT

A. Undisputed Facts

1. This Court is vested with jurisdiction.

2. Mr. Zahn was at all times material hereto a resident of Douglas County, State of Washington, which is within the Eastern District of Washington.

3. For approximately twenty (20) years, Mr. Zahn worked as an electronic system control crafts worker at the Chief Joseph Dam Project ("the Dam"), operated by the United States Army Corps of Engineers ("Corps").

B. Facts Found by the Court

1. Mr. Zahn was one (1) of three (3) electronic system control crafts workers at the Dam along with eighteen (18) operators under the supervision of John Skibby, Chief of Operations at the Dam. With the exception of a few days at the beginning of January 2001 and for a grievance hearing in February 2001, Mr. Zahn did not work at the Dam from June 21, 2000, to October 2001, when he began his retirement. During that period, Mr. Zahn was either on leave without pay, sick leave, or annual leave. Mr. Zahn applied for early retirement in May 2001.

2. Mr. Zahn filed workplace grievances and EEOC complaints in 2000, which are protected activities. While one or more of those complaints were on file, he was granted leave under the Family Medical Leave Act (FMLA) and met with Ed Reynolds, the

Dam's Operations Project Manager, regarding his return to work. Mr. Zahn was permitted to return to work, albeit only for a few days in early 2001.

3. Following a telephone conference with the Corps' Seattle headquarters on January 5, 2001, during which there was some discussion regarding the potential for workplace violence by Mr. Zahn, Mr. Reynolds sent Mr. Zahn both an e-mail and a certified letter instructing him not to return to work and denying him access to the Dam based on the medical letters Mr. Zahn submitted when he returned to work. There is no evidence that anyone participating in the decision to issue this instruction was motivated by discriminatory bias or retaliatory animus relating to Mr. Zahn's EEOC complaints and workplace grievances.

4. Mr. Skibby credibly described Mr. Zahn as an extremely intelligent man whom he had favorably evaluated as late as February 2000 as important to the Dam's operations. Mr. Skibby favored Mr. Zahn's return to work at the Dam because he was needed. Mr. Skibby did not deny any of Mr. Zahn's leave requests and properly forwarded Mr. Zahn's August 2000 FMLA request. That this request was not acted on until October 2000 was not due to any bias or retaliation by Mr. Skibby. Mr. Zahn did not prove that Mr. Skibby acted out of discriminatory animus or in retaliation for Mr. Zahn's EEOC complaints and workplace grievances. Mr. Skibby's evident irritation with the necessity for extra work associated with responding to Mr. Zahn's complaints and requests

to return to work is understandable given his weighty duties as Chief of Operations. Nothing in Mr. Skibby's demeanor while testifying supported any discriminatory bias or retaliatory attitude towards Mr. Zahn. The decision to decline Mr. Zahn's request for an accommodation to allow telecommuting was neither unreasonable nor animated by discrimination or retaliation; rather, the Dam's control system precluded outside access to its computer system and Mr. Zahn's duties required his presence at the Dam powerhouse. Further, there was no evidence that Mr. Skibby had any impact on the Corps decision, which was largely driven by Seattle headquarters, to issue the letter directing Mr. Zahn not to return to work. This letter ("the instruction") was prepared and sent by Ed Reynolds. There is also no evidence that Mr. Skibby opposed Mr. Reynolds' later effort to mediate with Dr. Frese and Mr. Zahn on a return to work.

5. The only evidence of Mr. Reynolds' conduct was contained in the exhibits admitted and testimony about him because neither party took his deposition and Mr. Zahn's effort to subpoena him for trial failed. Neither the admitted exhibits nor the trial testimony demonstrated any discriminatory bias or retaliation by Mr. Reynolds. In fact, Mr. Reynolds' behavior, as reflected in the trial testimony and admitted exhibits, including Plaintiff's Exhibit No. 104-12 – a notation memorializing a financial award by Mr. Reynolds to Mr. Zahn for his work efforts – , demonstrated a sincere respect for Mr. Zahn and a genuine interest to

find a solution enabling Mr. Zahn to return to work. This is most clearly demonstrated by his decision in the spring of 2001 to retain Dr. Frese, one of Mr. Zahn's treating care providers; to mediate with him and Mr. Zahn on returning to work.

6. Mr. Zahn was well prepared at trial. He exhibited intelligence, diligence, and familiarity with the rules of evidence and procedure. He made appropriate objections and cogent legal arguments throughout the trial, including a motion for a directed verdict as a matter of law.

7. The instruction not to return to work, together with the necessary dissemination of that instruction to appropriate personnel at the workplace, spawned rumors. Mr. Zahn was emotionally impacted by both the instruction and the rumors. As a long-time Dam employee, his work became a part of how he saw himself, a part of his self worth. It has been said, "we are what we do." It follows that the longer a person does a job, the more the person becomes it or the more it becomes a part of the person's self image and value. When a person is no longer permitted to do that job, particularly involuntarily, the impact on self image and psyche can be very damaging. Americans are workers – often said to be the most productive in the world. Putting pundits aside, American workers take pride in their work. There is also a dignity in work, particularly of the kind done by Mr. Zahn and the others at the Dam – a project of enormous importance to the Northwest – which is lost when that work is terminated. In a

perfect world, perhaps the situation here could have been resolved without the instruction not to return to work, but perfection is not required. All that is required is that such an instruction not be issued because of discriminatory bias or in retaliation for protected activity. Here, there is no proof by a preponderance of the evidence that it was.

CONCLUSIONS OF LAW

While the Court empathizes with Mr. Zahn and respects his intelligent and diligent presentation of his case, the Court concludes as a matter of law that Mr. Zahn did not prove by a preponderance of the evidence that Defendant violated Title VII, the ADA, the RA, or the WLAD.

A. Title VII

Title VII, 42 U.S.C. § 2000e *et seq.*, prohibits employment discrimination, including retaliation. In order to prove a Title VII retaliation claim, Mr. Zahn had the burden of proving by preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an adverse employment action, (3) the protected activity was a motivating factor in the adverse employment action, and (4) he suffered resulting damages. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir. 1994).

Mr. Zahn satisfied the first element by establishing that he filed workplace grievances relating to the

distribution of overtime – a protected activity. 42 U.S.C. § 2000e-3(a). Mr. Zahn, however, failed to present evidence that he suffered an adverse employment action motivated by this protected activity. An adverse employment action is broadly defined as an employment action "reasonably likely to deter employees from engaging in protected activity." *Ray v. Henderson,* 217 F.3d 1234, 1243 (9th Cir. 2000). Whether the protected activity was a motivating factor – a factor that "played a part in the employment decision" – may be inferred from proximity in time between activity and action. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 241 (1989) (plurality opinion); *Ray,* 217 F.3d at 1234. If the employer would have made the same decision notwithstanding the employee's participation in the protected activity, then the employee will have failed to prove by a preponderance of the evidence that the protected activity was a motivating factor. *Stegall v. Citadel Broad. Co.,* 350 F.3d 1061, 1067-68 (9th Cir. 2004); *Costa v. Desert Place,* 299 F.3d 838, 857 (9th Cir. 2002).

Mr. Zahn failed to establish by preponderance of the evidence that his workplace grievances played a part in the decision to issue the "do not report to work" instruction. The evidence established that the Corps would have so instructed Mr. Zahn notwithstanding his workplace grievances. Accordingly, Mr. Zahn's Title VII claim fails.

B. ADA, RA, and WLAD

Mr. Zahn also sought recovery under the ADA, RA, and WLAD for Defendant's alleged retaliatory conduct. The ADA provides, "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter." 42 U.S.C. § 12203(a). Similarly, the RA states:

> No otherwise qualified individual with a disability in the United States, as defined in § 704(20) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

29 U.S.C. § 794(d). The WLAD prohibits discrimination "against any person in compensation or in other terms or conditions of employment because of . . . the presence of any sensory, mental, or physical disability. : . ." RCW 49.60.180(3)

The Ninth Circuit has recognized that the Title VII retaliation analytical framework is also used for the ADA, the RA, and the WLAD. *Barnett v. U.S. Airlines, Inc.,* 228 F.3d 1105, 1121 (9th Cir. 2000) (adopting Title VII analysis for the ADA); *Coons v.*

Sec'y of U.S. Dep't of Treasury, 383 F.3d 879 (9th Cir. 2004) (adopting ADA analysis for the RA); *Stegall v. Citadel Broad. Co.,* 350 F.3d 1061, 1065 (9th Cir. 2003) (utilizing Title VII analysis for WLAD). Because Title VII standards apply to ADA, RA, and WLAD retaliation claims, the Court likewise concludes that Mr. Zahn failed to carry his burden to prove by a preponderance of the evidence retaliation under the ADA, the RA, or the WLAD for requesting accommodation.

CONCLUSION

For the reasons given above, Mr. Zahn failed to establish by a preponderance of the evidence a violation of Title VII, the ADA, the RA, or the WLAD. Accordingly, **IT IS ORDERED:**

1. **Judgment** shall be entered in Defendant's favor with prejudice.

2. The remainder of Mr. Zahn's Objections to Witness/Exhibit List and Motions in Limine **(Ct. Rec. 190)** are **DENIED AS MOOT.** The Court's admissibility rulings are reflected on the record.

3. This file shall be **CLOSED.**

IT IS SO ORDERED. The District Court Executive is directed to enter this Order, enter judgment in favor of Defendant and furnish copies to Mr. Zahn and counsel.

DATED this 31st day of December 2008.

s/ Edward F. Shea
EDWARD F. SHEA
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN ZAHN, Plaintiff-Appellant, v. JOHN McHUGH, Secretary of the Army, Defendant-Appellee.	No. 09-35043 D.C. No. 2:03-cv-00356-EFS Eastern District of Washington, Spokane ORDER (Filed Jul. 21, 2010)

Before: SCHROEDER, PREGERSON, and RAWLINSON, Circuit Judges.

Zahn's petition for panel rehearing is denied.

No further filings shall be accepted in this closed case.

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE EASTERN
DISTRICT OF WASHINGTON

BRIAN ZAHN, Plaintiff, VS. DR. FRANCIS J. HARVEY, Defendant.	NO. CV 03-356-EFS Richland, Washington Monday, October 27, 2008

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS-DAY ONE

PAGES 1 TO 246

VOLUME 1

BEFORE THE HONORABLE EDWARD F. SHEA

UNITED STATES DISTRICT COURT JUDGE

REPORTED BY: Stephanie Smithson, RMR
Official Court Reporter
825 Jadwin Avenue, Suite 174
Richland, WA 99352

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

* * *

[6] MONDAY, OCTOBER 27, 2008 9:09 A.M.

PROCEEDINGS

THE CLERK: Matter before the Court is Brian Zahn versus Dr. Francis J. Harvey, case number CV-03-356-EFS. Time set for bench trial. Please state your presence for the record.

MR. ZAHN: My name is Brian Zahn.

THE COURT: Mr. Zahn, good morning.

MR. BIVIANO: Andrew Biviano for the United States, your Honor, along with Siri Nelson, agency counsel and client representative.

THE COURT: Mr. Zahn, do you want to make an opening statement?

MR. ZAHN: Yes.

THE COURT: All right. Go to the podium, please.

I've read your objections to Mr. Biviano's revised trial brief, and I'd be grateful if you would explain to me the difference between your objection that he's using a wrong standard and then your insistence that under the WLAD he used that very same standard.

MR. ZAHN: The standard that he's supplying for the federal is a combined standard that allows release of liability. So I'm saying that I can make the

higher standard for precluding that stratagem of defense.

THE COURT: I'll take a look at it, but you're also [7] saying that on the state level that it was a motivating factor.

MR. ZAHN: Yes, your Honor. In the very least, it was a motivating factor.

THE COURT: How does that differ from what he proposed on the federal level?

MR. ZAHN: It's a softer, easier standard to make at the state level.

THE COURT: Well, how does that language differ from the language that he proposed applied on the federal level? Tell me the difference.

MR. ZAHN: It's confusing, your Honor. I look at the Ninth Circuit model jury instructions, and they have a "motivated by" third part, and they have a "but for" third part. And from what I see, it's very confusing even in case law, but the one standard, as Mr. Biviano would like to use it on the federal case, allows for a release of liability under the same decision argument. The state –

THE COURT: Your approach to this is unclear to me.

MR. ZAHN: Pardon?

THE COURT: What you're saying is unclear to me.

MR. ZAHN: The third element of proving a retaliation case under the Ninth Circuit jury instructions – the first is that you engaged in protected activity. The second is that there was an adverse action. The third is that there was a causal connection that was either a "but for" that protected [8] activity it wouldn't have happened, or the option is that it was a motivating factor. A motivating factor is an easier bar to make.

THE COURT: Easier bar?

MR. ZAHN: An easier standard, if you will.

THE COURT: Do you mean you have to prove less or more?

MR. ZAHN: It appears to me that you only have to prove that it's – you have to prove that it's a motivating factor. So you prove less.

THE COURT: And you object to proving less.

MR. ZAHN: No, your Honor. I object to the fact that he's combined those two so that it allows the defense to argue the same declaration would have been made anyway absent discriminatory animus and, therefore, avoid liability.

THE COURT: You also assert that he's failed to appreciate that the dissemination of the medical records could be considered an adverse action and retaliatory, right?

MR. ZAHN: Yes.

THE COURT: And I agree that that's in the case.

Anything else you want to say before I hear from you?

I asked some questions. Now, if you have an opening statement, go ahead and make it.

MR. ZAHN: This case concerns equal opportunity, of course, and more specifically retaliation. I believe

* * *

[63] THE COURT: Well, I have some grave concerns about admitting an affidavit unless he was subjected to cross-examination.

MR. ZAHN: It's the only evidence I have, or the only means that I have for some of that evidence, and it is a document that I can't replace. He was the individual in charge at the time. I believe it's exceedingly relevant that – that is available.

THE COURT: Was his deposition taken?

MR. ZAHN: He did have testimony taken while he was still project engineer at the OCI, but this is counter to some of that testimony.

THE COURT: Was Mr. Reynolds' deposition taken?

MR. ZAHN: Yes.

MR. BIVIANO: Your Honor, no.

MR. ZAHN: Testimony.

MR. BIVIANO: Mr. Zahn's referring to the sworn testimony in the OCI investigation in July of 2001. That is sworn with cross-examination. I have no objection to that being admitted. However, Mr. Reynolds was not deposed following that. He was not deposed regarding his affidavit.

MR. ZAHN: I've done the best I could to obtain him under subpoena, Judge Shea.

THE COURT: Well, that may be. My concern here is not that you – I'm not faulting you, Mr. Zahn. The problem is [64] that I can't admit evidence that the other side doesn't have a chance to cross-examine. You want to get it in, because it's favorable to your case. That's understandable. But they have a right to ask him questions, you said this then, now here you say this. You have to explain why you said one thing on one occasion and one thing on another, what was the motivation, why was he – how did he separate from the service, what was the nature of that relationship at that time, what other issues does he have, what credibility determinations could be made. If he's not in front of me, I don't know whether the man's credible or incredible.

If they were going to do the same thing to you, I'd have the same problem with him. They were trying to put in an affidavit that you had no chance to cross-examine. That was really contrary to your best interest. I wouldn't let that in, because you wouldn't have a chance to cross-examine that person to say – point

out all the reasons I shouldn't believe that person. So I treat you the same as I'm treating then. If they can't get Mr. Reynolds – if they can't put in an affidavit that would hurt your case because you had no chance to cross-examine the person, well, I'm not going to let you do that either. Either Mr. Reynolds will hold still for a subpoena and come to court, and/or he won't.

When's the last time you talked with this man?

MR. ZAHN: I don't recall.

[65] THE COURT: Was it this year?

MR. ZAHN: I don't believe so, no.

THE COURT: If you send out a subpoena request and it comes back unnerved, the only thing I'm going to let in is testimony that he supplied where the other side had a chance to cross-examine him, because, otherwise, it's simply not fair. It's evidence –

MR. ZAHN: He does have it signed, and it's under a notary seal.

THE COURT: That may be, but he doesn't get to put in an affidavit unless he stands for cross-examination, and since this is different, I'm told, from his testimony at the hearing, that points out all the more why he has to hold still for a deposition or come to court and testify, and if you haven't talked with him in months and you don't know where he is, all the Court can do is say, yes, issue a subpoena, bring

this man to court, come here and testify. There's nothing else I can do for you.

So as to the – these are affidavits that I said could be used to refresh the individuals when they came here, correct?

For the witness who appears on these affidavits would be to refresh their recollection, not your recollection. So they're not – if they're not – it's not a question of being unavailable, per se. It's that there has to be other [66] evidence – other – it has to be a format where certain things are true, unless you have something else to persuade me otherwise, and I'll listen to you if you do.

MR. ZAHN: I don't have any other means that I know of to get some of the evidence and statements in, being as he was outside of the employment of the defendants. I think he had an option to be more honest, and he wouldn't, didn't feel like he was going to be retaliated against and that he had a return to conscience, and so he gave what he felt was a true statement.

THE COURT: No. I'm not going to permit it in for the reasons I've explained. This says he was in California when he signed this.

MR. ZAHN: That's correct. He is out of state, perhaps.

THE COURT: And it was signed more than three years ago.

MR. ZAHN: Yes. I believe it was back in 2005.

THE COURT: That's correct. And how did it get in the file? What was it filed for?

MR. ZAHN: I had some contact with him. I believe that –

THE COURT: Was this filed in connection with any motion, Mr. Biviano, that you know of, or is it simply –

MR. ZAHN: Yes.

MR. BIVIANO: It was the motion for reconsideration [67] from the Court's prior order dismissing the case. This was attached to that. So background, the only grounds for this case to be revived, so to speak, was the testimony of Mr. Reynolds, and that's not currently before the Court and unavailable.

THE COURT: That's correct. No one took his deposition. I had no deposition for him. The affidavit got you by a motion, but it doesn't get you to – it doesn't go into evidence, per se. It got you by the motion, but it doesn't come into trial. You have to have the – you have to have – if you get him and he's – and he is subpoenaed and he can testify by video conference or something else, or by telephone, all of which is available, great, but not this way.

MR. ZAHN: And if he's out of state and unavailable, which apparently he is.

THE COURT: Well, no. It's not unavailable, as such. That let's you get in a letter, a sworn statement that he gave you. That's not enough. The fact that he's not available is not going to get you the statement without the other side having an opportunity to cross-examine him, and I don't want to repeat myself. It would just be counterproductive. So I'm not going to permit 17, 18 and 19.

What else?

MR. BIVIANO: The copy of the evidence that I have doesn't have the 17, 18, 19. I only have the page numbers.

THE COURT: That's 67 through 72. That's Exhibit

* * *

REPORT OF INVESTIGATION

Agency Docket Nos.: FO0102B0010 FO0105B0040 FO009A0050	**Investigating Office:** OCI-Sacramento
Activity Filed Against:	Seattle District, U.S. Army Corps of Engineers (USACE) Seattle, WA 98124-3755
Complainant's Name and Address:	Brian S. Zahn [Home Address Omitted] Bridgeport, WA 98813
Representative's Name and Address:	None
Dates of Initial Contact with EEO Counselor:	December 15, 2000 (FO0102B0010) April 13, 2001 (FO0105B0040) August 31, 2000 (FO009A0050)
Dates Complaint Filed:	February 16, 2001 (FO0102B0010) May 17, 2001 (FO0105B0040) October 16, 2000 (FO009A0050)

Dates Investigation Requested: March 6, 2001 (FO0102B0010)
May 31, 2001 (FO0105B0040)
June 1, 2001 (FO009A0050)

Dates Requests Received by OCI: March 13, 2001 (FO0102B0010)
June 13, 2001 (FO0105B0040)
June 13, 2001 (FO009A0050)

Dates of Investigation: July 31 – August 1, 2001

Bases: Physical/mental disability (alcoholism and stress), reprisal (prior protected activity)

Claims:

Complaint 1 (FO0102B0010), Complainant alleges:

1. Supervisor, John Skibby and Terry Conover, Management Employee Relations Office, convinced Mr. Reynolds, Project Manager, not to assist him with gathering witness statements for his Office of Workers Compensation Program (OWCP) claim;

Conover, Terry D NWS

From:	Conover, Terry D NWS
Sent:	Friday, January 05, 2001 11:46 AM
To:	Reynolds, Ed J NWS; Skibby, John R NWS; Applebury, Brian R NWS; Holt, Mark LTC NWS; Anderson, Marianne O NWS; Marsh, Ronald S NWS; Espinoza, Rosarita M NWS
Cc:	Eckerlin, Nancy B NWS; Stull, Alice A NWS
Subject:	Conf Call Today at 1:30 p.m.
Importance:	High

Hello All:

Please join in a conference call, which be held today, at 1:30 p.m., from Brian's Applebury's office.

The purpose of this call is to discuss a situation concerning an employee's medical situation and his return to work.

Thanks,

Terry
Terry Conover
Civilian Personnel Advisory Center
U.S. Army Corps of Engineers, Seattle District
Voice: 206.764.6171 Fax: 206.764.6685
E-mail: Terry.D.Conover@NWS02.usace.army.mil

Apparently Mr. Zahn had various encounters with the police ranging from assault to alcohol, to drugs. Most of those on the Seattle side seemed to think there was reason for concern, and that immediate action was necessary. John was certainly somewhat nervous as it was.

The following actions were decided upon as the best course of action:

1. Immediately stop Brian from coming back onto the Project
2. Get back any keys he might have to the Project
3. Contact the local Sheriff to inform him of possible trouble
4. Place an armed guard on the Project
5. Contact Brian's Doctor and Clinical Psychologist to remind them of there obligations to warn us of possible violence.
6. Contact the UPTO shop steward and give him partial information on security.
7. Contact Cy Jones to see if somehow he could act as a mediator

I contacted Mrs. Beauregard to handle the security aspect while I called Brian and his doctors. I then attempted to call Brian, but as expected his line was busy. I then called Cy Jones, his wife informed me he was out of town and state. She called back with his number, but by then I didn't think it was necessary to

involve him. I called both care givers. I did not have a current phone number for the residence of the shop steward as he had it changed after an incident with one of the other operators.

Eventually Doctor Glen Frese called back, and John and I talked to him. Glen indicated that Brian was heavily into symbolism more then substance. He wanted to be valued, and needed some symbolic victory. Glen offered his professional services at $90 per hour to help us with the problem. I sensed from what he said that most of the hostility was focused on John. He was aware of his responsibility to warn us of any impending hostile act against us or the dam. We left it at him sending us a letter with his rates and which weekends he would be available. His plan was to have Brian give him a tour of the dam work area, then bring me into conversation with Brian, and then an hour latter to bring John into the conversation.

Laura came in during that conversation and informed us that the earliest we could have an armed guard available was January, 16th. She also informed us of the cost. Based on the fact that an armed guard would not be available for over a week, and that Glen indicated the major hostility was toward John. I put John on a special assignment he could do at home. I had indicated to everyone that I did not foresee a threat until after Feb 6, 2001, when Brian and the UPTO attorneys would have a hearing with the FLRA representative over Brian's unfair labor practice

claim, but felt there was the unknown of how Brian would react to his being barred from the Project.

Friday night from home, I again tried to call Brian Z, as usual his phone line was busy. John Skibby called me from the dam and with ??? informed me that the guard had told him that we had fired Brian Zahn. I asked ??? to call back the guard and tell him that wasn't true.

From: Reynolds, Ed J NWS
Sent: Monday, January 08, 2001 9:59 PM
To: Koontz, Warren E NWS
Subject: FW: Do not report to work instructions

Hi Warren, Gary Smit suggested that I keep you in the loop even though I have been talking to Doug. Please read this e-mail I sent to Brian Zahn, after spending lots of time trying to reach him by phone. I'll be in contract negotiations along with Travis, but let me know if there is anything I can do to answer any questions you may have. Ed

-----Original Message-----

From: Reynolds, Ed J NWS
Sent: Sunday, January 07, 2001 11:55 AM
To: 'endoftheriver@yahoo.com'
Cc: Fisher, Douglas NWS; Applebury, Brian R NWS; DLL-NWS-OD-CJ Supervisors/Foremen
Subject: Do not report to work instructions

Hi Brian, this past Friday I had an opportunity to review your case and decide on a course of action for us. On Dec 28th I directed you into a "transition" program which would have eventually have returned you to the powerhouse under John Skibby's supervision, At the time I made that decision, I did not have the benefit of recent letters from Dr. Tracy and Dr. Frese. Based on the letters from them that you provided me this last Tuesday and the other on Wednesday, I am ending this transition approach immediately. I quote Doctor Tracy's letter of Dec 26th, "I think it would be inadvisable to return to the previous workplace and structure." In your Clinical

Psychologist's, Glen Frese, letter of December 27th, he states, "it is my opinion that Mr. Zahn cannot return to full work duties unless there is some resolution of the underlying problems." After carefully considering these letters, I now am instructing you to do the following:

1. please do not come back to work.
2. please do not contact Mr. Skibby either on or off the Project.
3. please return any Project keys you have by mail or via a current full time employee of the Project.
4. until I notify you, you are denied access rights to the Project.

Brian, I view the above actions necessary to ensure your safety. I am placing you in a LWOP status. I am taking the above actions based on the collective medical opinions of your treating physician and clinical psychologist. I believe that my instructions to you are in both yours and the Project's best interest. I am arranging for a constructive method to bring you back to the Project and repair relationships. It will take a little time to make those arrangements. Brian, I am sincerely trying to do whatever I can to ensure that your re-entry back to the work environment is a smooth one, even it takes a day at a time. I have copied this message both to the UPTO Shop Steward and the other supervisors and foremen because I will be away from the Project until January 16th, and I don't want any misunderstanding of my instructions or intentions. I wish I could have talked with you by

phone before I had to leave for Portland, but your line was busy every time I tried to call and I needed to have you get this message before this coming Monday. I will instruct Mrs. Schreiber to have this message put into an official letter format and send it to you by certified mail.

Best wishes, Ed

Conover, Terry D NWS

From:	Conover, Terry D NWS
Sent:	Tuesday, January 09, 2001 1:11 PM
To:	Reynolds, Ed J NWS; Applebury, Brian R NWS; Jenson, Mark C NWS
Cc:	Marsh, Ronald S NWS; Holt, Mark LTC NWS
Subject:	RE: Contact

Ed:

When you get back, we will talk.

We have to have "cause" to propose removal, Ed. In cases where employees are absent from the job for long periods of time, this "cause" could come from a number of different angles – e.g., AWOL, inability to perform (if we have medical info that an employee was unable to work), etc. I realize you are not really proposing any particular action at this time – just don't let your frustrations get the best of you. We will work through this with Brian.

I spoke with Dr. Glen Frese, Brian's treating psychologist at 10:00 this morning. I shared with Dr. Frese our wanting to maintain a regular dialogue with Brian as he (Brian) works through his difficulties in the coming weeks. Dr. Frese told me that Brian has assured him (Frese) that he (Brian) would not be a danger to himself OR to others. Dr. Frese also told me that if he (Frese) ever became aware of a change in Brian's intentions in this regard, he (Frese) would contact us immediately.

AfterThought: I expected Brian to react. Didn't you . . . really? If your letter represented the "most mellow non-threatening e-mail the world has ever seen," think how Brian might have reacted receiving a more aggressive version . . .

. . . terry

-----Original Message-----

From: Reynolds, Ed J NWS
Sent: Monday, January 08, 2001 09:53
To: Applebury, Brian R NWS
Cc: Conover, Terry D NWS; Marsh, Ronald S NWS; Jenson, Mark C NWS
Subject: Zahn contact

Brian, Mark left a message on my hotel phone that he received a phone call from Mr. Zahn, I think near 4pm. Mark stated that Brian sounded agitated and didn't understand why I had taken the action I did. Mark invested time bringing him back to the statements in my e-mail too him, but apparently without success. Personally, I think Terry helped me massage that e-mail into the most mellow non-threatening e-mail the world has ever seen. I still recommend just firing him, and then letting the chips fall where they may. How much more time do we want to invest in non-productive work? Remember we are not obligated to help him as OWCP supports that this is not work related. Ed

Nelson, Siri C NWS

From: Reynolds, Ed J NWS
Sent: Wednesday, January 10, 2001 5:11 PM
To: Skibby, John R NWS
Subject: RE: How I spent today's lunch break

Ops! Yes we talked about that at the meeting. Once Brian is no longer an employee, UPTO will drop all that nonsense. Ed

-----Original Message-----

From: **Skibby, John R NWS**
Sent: Wednesday, January 10, 2001 2:27 PM
To: Reynolds, Ed J NWS
Subject: RE: How I spent today's lunch break

Ed:

Should both grievances, both Unfair Labor Practices (not filed through UPTO), the EEO appeal (not filed through UPTO), and any future actions from Mr. Zahn be a part of this agreement?

Should Brian's physician, Dr. Tracy, also be involved in an evaluation process?

Thanks,

John S.

-----Original Message-----

From: Reynolds, Ed J NWS
Sent: Wednesday, January 10, 2001 01:30
To: Applebury, Brian R NWS; Marsh, Ronald S NWS; Conover, Terry D NWS
Cc: Jenson, Mark C NWS; Skibby, John R NWS
Subject: How I spent today's lunch break

This information is sensitive, so please keep it to you self.

UPTO has agreed to the following actions in regard to Mr. Zahn:

1. UPTO will notify the FLRA examiner that they are not ready for the Feb 6th hearing.
2. We will split the cost of rescheduling that hearing to a latter date
3. The UPTO President and Seattle District VP will travel to CJ and visit with Brian off site
4. They will attempt to convince Brian that he should seek medical retirement on the basis of mental health and give up the Unfair Labor Practice in exchange for Management's cooperation in obtaining his medical retirement.
5. They were authorized official time by Peter Gibson for this purpose.
6. UPTO will pay his Clinical Psychologist to help prepare the necessary evaluation. (Terry, Ray Quinn gave UPTO a reference to a standard mental health screening test

that must accompany his request for medical retirement, you probably know it too)

7. After the initial meeting, it will be Terry's and Warren Koontz's task to complete the process for Brian's expedited medical retirement.

8. Upon approval of Brian's medical retirement, UPTO will drop the Unfair Labor Practice.

Travis shares our concerns on safety about Mr. Z. Also Ray suggested that it would be Management's advantage to be unaware of any drinking or drug problems as we process the medical retirement. All those in attendance (Peter, Ray, Travis, and myself) were in agreement that this was in the best interest of Management, UPTO, and the employee.

Ed

Espinoza, Rosarita M NWS

From: Brian Zahn [endoftheriver@yahoo.com]
Sent: Saturday, January 20, 2001 09:00 AM
To: Espinoza, Rosarita M
Subject: addendum to complaint

Rosa,

I would like to add to my current EEO complaint under your evaluation; that I have made numerous requests for accommodation by being allowed email access and a government computer to be able to do some work from home. Also to be allowed flex time. Both of those requests have been effectively denied, yet have been furnished other employees previously.

Sincerely, Brian Zahn

Do You Yahoo!?
Yahoo! Auctions – Buy the things you want at great prices.
http://auctions.yahoo.com/

Skibby, John R NWS

From: Reynolds, Ed J NWS
Sent: Tuesday, January 30, 2001 06:04 PM
To: Espinoza, Rosarita M NWS; Conover, Terry D NWS
Cc: Marsh, Ronald S NWS; Skibby, John R NWS; Parks, Diane E NWS; Jenson, Mark C NWS
Subject: RE: Do not report to work instructions

Since I am experiencing system problems while in Portland, I am going to attempt to send you the response I sent Brian Z. Good or bad at least it's timely for me. Ed

[Icon Omitted In Printing]

-----Original Message-----

From: Espinoza, Rosarita M NWS
Sent: Monday, January 29, 2001 8:08 AM
To: Conover, Terry D NWS; Reynolds, Ed J NWS
Cc: Marsh, Ronald S NWS; Skibby, John R NWS; Parks, Diane E NWS; Jenson, Mark C NWS
Subject: RE: Do not report to work instructions

I don't know if Brian has agreed to mediation or not, but we need to make sure he agrees to it before we contract out this guy. Also, if we mediate, I would strongly suggest that if the issues get resolved through the mediation, that a negotiated settlement agreement be drawn up. If successful, we may even be able to wipe out his 2nd complaint.

I agree with Terry that you could hire this person using VISA under other contractual services. The sooner we do this the better.

-----Original Message-----

From: Conover, Terry DM NWS
Sent: Friday, January 26, 2001 01:54
To: Reynolds, Ed J NWS
Cc: Espinoza, Rosarita M NWS; Marsh, Ronald S NWS; Skibby, John R NWS; Parks, Diane E NWS; Jenson, Mark C NWS
Subject: RE: Do not report to work instructions

Ed et. al.:

Do we not owe Brian some explanation to his questions? I think he is asking some legit questions. Does his "don't call me – just e-mail me" still exist?

Ed, I realize you asked me if I could work up the Brian Zahn-Clinical Psychologist-Supervisory folks mediated session for you. But, I candidly have not had the time over the past couple days to connect with our Contracting folks yet, and since I don't work up contracts, I am not sure what I could do short-cut wise to make this happen quickly. But, I know this is important to you. Perhaps your admin staff could work it through your VISA purchase route. I could, if needed, work up a statement of work. Just wondering out loud. I am not sure. What do you think?

. . . terry

-----Original Message-----

From: Reynolds, Ed J NWS
Sent: Thursday, January 25, 2001 09:16

GLEN FRESE, PSY.D.
CLINICAL PSYCHOLOGIST

May 6, 2002

Re: My letter dated 12/27/00 about Brian S. Zahn

To Whom It May Concern:

It has come to my attention that the letter that I wrote on 12/27/00 about Mr. Zahn's mental status was improperly used by his employer as justification to end his transition back into the work environment. I understand that he was subsequently given a letter by his employer that partially used my letter to justify directing him not to return to work.

While I noted that Mr. Zahn's medical/emotional/psychological response to the conflict in his work setting had not changed, the emphasis that I had intended in my letter was to employ specific recommended accommodations to allow a stepwise reintroduction of Mr. Zahn back into his work setting. As stated in my letter, these were reasonable accommodations: some work from home, a flexible work schedule, and a sincere effort on the part of the employer to negotiate concerns and find common ground and would have allowed his stepwise introduction of Mr. Zahn back into his work environment over an 8 to 12 week period.

Unfortunately, Mr. Zahn's employer chose to ignore this opinion and recommendation. My cautionary statement that an adversarial style from the

management would not be successful in returning Mr. Zahn to such a hostile work environment proved to be true. My subsequent involvement to mediate Mr. Zahn's return to work was unsuccessful due to his employer's disinclination or inability to supply any of these requested reasonable accommodations or to restructure managerial authorities. The net result of the administrations positioning was to end Mr. Zahn's career.

Mr. Zahn's emotional, psychological, financial, and social distress has been devastating to him. This distress has currently extended past three years and cost him his job, his self-esteem, peace of mind, ability to relax and enjoy life, adversely affected his mental and physical health, dissolved important social relationships, and isolated him. Mr. Zahn will likely suffer residual adverse affects from this major disaster in his personal life.

Mr. Zahn has been outside of his former job now for almost two years. Mr. Zahn's extreme anxiety response has been sustained for such an extended length of time, without any measurable attempt by his employer towards resolving these problems, that it would no longer be advisable or feasible for him to attempt a return to his former work environment. It is recommended that Mr. Zahn retire if possible, or choose another line of work if practical, one that is less stressful.

Sincerely,

/s/ Glen Frese, PsyD
Glen Frese, Psy.D.
Clinical Psychologist

GAF/sf

OKANOGAN COUNTY COUNSELING SERVICES
CHEMICAL DEPENDENCY PROGRAMS

P.O. BOX 3208, 307 S. Main
OMAK, WASHINGTON 98841
(509) 826-5600 FAX (509) 826-3648

December 28, 2000

Douglas County District Court
110 3rd St. NE
Wenatchee, WA 98802

RE: Brian S. Zahn **CASE NO#: CR02880/ CR02890**

Your Honor:

Brian S. Zahn is IN COMPLIANCE for the following reason:

> Satisfactorily completed the two (2) year Deferred Prosecution treatment program as per court order.
>
> Dates of program: 03-11-99 to 12-22-00

Mr. Zahn has completed all aspects of his treatment program including intensive out-patient and his aftercare/relapse prevention programs.

Thank you for the referral to our agency. If you need further information, please contact our office at (509) 826-5600.

Sincerely,

/s/ Michael R. Arrington
Michael R. Arrington, CDP
Chemical Dependency Programs

/nb

cc: Bruce Voie, P.O.
client
file

WASHINGTON STATE PATROL

Identification and Criminal History Section
PO Box 42633
Olympia WA 98504-2633

PAID WASIS
024906 JUL 10 02
WSP IDENT SECTION

REQUEST FOR CONVICTION CRIMINAL HISTORY RECORD

INSTRUCTIONS:
PLEASE COMPLETE THIS FORM WHEN REQUESTING *CONVICTION* CRIMINAL HISTORY RECORD INFORMATION FROM THE WASHINGTON STATE PATROL IDENTIFICATION AND CRIMINAL HISTORY SECTION. MAIL REQUEST TO ADDRESS NOTED ABOVE WITH $10 MONEY ORDER, COMMERCIAL BUSINESS ACCOUNT CHECK or CASHIER CHECK, (*no personal checks*). PAYABLE TO THE WASHINGTON STATE PATROL.

NOTE: The requested record information is furnished solely on the basis of name and/or description similarity with the subject of your inquiry. Positive identification or non-identification can only be effected upon receipt of fingerprints. Subject may be advised of inquiry.

42 JUL 18 '02

SUBJECT INFORMATION: (Please provide as much information as possible in space below)

Applicant's Name: ZAHN (Last) BRIAN (First) STEVEN (Middle)

Alias/Maiden Name: _____

Date of Birth: [Date Of Birth Omitted] (Month Day Year) Sex: M Race: W

Social Security Number: [Social Security Number Omitted]

Drivers Lic. Number/State: ZAHN*BS494 1 RT

PURSUANT TO PURPOSE OF INQUIRY NO RECORD IN WASIS FILES BASED ON DESCRIPTORS PROVIDED
WSP USE ONLY

REQUESTER INFORMATION:

DATE: July / 8 / 2002 (Mo. Day Yr.)

BRIAN ZAHN
(print) Name/ Title of Requester

PHONE No. (509) 686-7851

Brian Zahn
Requester's Signature

REQUESTOR'S ADDRESS:
(type or clearly stamp address)

BRIAN ZAHN
[Home Address Omitted]
BRIDGEPORT WA
98813

ARTICLE		PAGE
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PREAMBLE

This collective agreement is between the Division Engineer, U.S. Army Corps of Engineers, North Pacific Division, hereinafter called the "Division," which includes the Division supervisory staff and the Portland, Seattle, and Walla Walla District Engineers and their project management, and the United Power Trades Organization, hereinafter called the "Union."

ARTICLE 1
EMPLOYEES COVERED BY THE AGREEMENT

Pursuant to the Certification of Representation dated October 28, 1981, issued by the Regional Director, Federal Labor Relations Authority, San Francisco, California, the Union is recognized as the exclusive representative of a bargaining unit consisting of Corps of Engineers' non-supervisory operation and maintenance employees, as defined by the Department of the Army, and are paid from the Pacific Northwest Regional Power Rate Schedule within the

Portland, Seattle, and Walla Walla Districts of the Division.

ARTICLE 2
EMPLOYEE-MANAGEMENT COOPERATION

2.1 The Division and the Union recognize that they have a common and sympathetic interest in the power industry in the Pacific Northwest and that the promotion of their common interests will be furthered and extended by the establishment and maintenance of employee-management cooperation between the Division and the employees.

2.2 It is understood and agreed by the Union that it is an unfair labor practice for the Union to call, or participate in a strike, work stoppage, or slowdown, or picketing of the Employer in a labor-management dispute if such picketing interferes with the Employer's operations, or to condone any activity hereto described by failing to take action to prevent or stop such activity.

2.3 It is also understood that personal participation by employees in a strike against the government of the United States or any agency thereof is prohibited by law.

ARTICLE 3
DISCIPLINARY AND ADVERSE ACTIONS

3.1 Disciplinary or adverse action includes written reprimand, suspension, involuntary reduction in grade or pay, removal, or enforced leave.

3.2 Disciplinary or adverse action will be taken only for just and sufficient cause.

3.3 No employee will be subject to disciplinary or adverse action for refusing to obey an unlawful order.

3.4 Prior to issuing a letter of reprimand or a notice of disciplinary action, the Employer shall undertake any necessary preliminary inquiry to obtain pertinent facts relating to the situation. The inquiry may include a discussion with the affected employee, and careful consideration of any of the employee's comments.

3.5 The Employer shall, at the time a proposed disciplinary or adverse action letter is issued, inform the employee that they have representational rights which include the Union. The employee in preparing and presenting a reply to the proposed action may represent himself or herself or be represented by the Union or non-union representative of his/her choosing. After the decision has been issued the employee may represent himself/herself or be represented by the Union in the grievance procedure. If the affected employee elects to use the statutory appeal procedure, he/she may designate the Union or other representative of his/her choice. If the employee elects to

be represented by the Union, copies of all subsequent correspondence addressed to the employee will be furnished to the Union Representative. Disciplinary or adverse actions are not grievable at the proposal stage. The time for grieving such actions runs from the date the employee receives the decision letter.

3.6 The procedures for taking disciplinary or adverse action shall be as follows:

a. Except for written reprimands, the Employer shall prepare a proposed notice stating specifically, and in necessary detail, the reason for the disciplinary or adverse action.

b. The employee shall be given ten (10) calendar days (except when the "crime provision" of 5 CFR 752 is invoked) to respond orally, in writing or both. The employee may request an extension of this time for sufficient reason.

c. The Employer will issue a written decision within a reasonable period of time after thoroughly considering the employee's reply.

ARTICLE 4
DUAL RATE

4.1 The parties recognize that there are positions (TC-C and above) within the bargaining unit that require a dual rate classification. A dual rate position is a position in which both primary and secondary classifications are involved. The position is called "dual rate" so that the employer is able to effect an

expedited temporary promotion to the secondary position. Dual rate pay will be in one (1) hour increments. All leave will be paid at the primary rate unless the employee is dual rated to the secondary classification for more than two (2) weeks. Such an employee may be paid leave at the secondary rate, or the Employer may terminate the dual rate assignment, but in no case will two (2) employees be paid at the secondary rate for the same assignment.

4.2 No employee not presently dual rated shall be assigned to a "dual rate" position without having applied for that position. It is understood that this does not prevent the Employer from assigning higher graded work to any employee. However, the Employer agrees to give first consideration for assignment of higher grade work to qualified "dual rate" employees before assigning such work to employees who are not "dual rate". Employees selected for the dual rate positions shall meet all qualification requirements of both the primary and secondary classifications and shall be selected in accordance with the applicable provisions of the Division Merit Placement and Promotion Plan. If there are any provisions of this Agreement which conflict with that plan, the provisions of the Agreement will control.

Affidavit of Mr. Edward J. Reynolds
in regard to
Brian Zahn v. R. L. Brownlee,
Acting Secretary of the Army
Case Number CS-03-0356-EFS

I, Edward J. Reynolds, want to make the following affidavit of my own free will regarding Mr. Brian Zahn and his employment with the Seattle District Army Corps of Engineers.

I knew Mr. Zahn for more than 10 years while we were both working at Chief Joseph Dam. As Project Engineer, I was the CEO and his second line supervisor. Mr. Zahn was an exemplary employee. He was the individual charged with the considerable responsibility of maintaining all aspects of the process control computers at Chief Joseph Dam, this country's second largest hydroelectric project. Mr. Zahn's technical expertise was highly regarded and he did a very difficult, stressful and demanding job extremely well for 20 years. He was basically on call 24/7 and 365 days of the year. Were there a K-grade work leader position established at Chief Joseph Dam he would have been the obvious candidate for the job. He was consistently successful and quick to restore the process control computers whenever there was an emergent problem. He willingly trained his coworkers and demonstrated a high degree of individual initiative. He earned numerous awards for sustained superior performances and his adopted suggestions. Several of Mr. Zahn's ideas were adopted without giving him proper credit. Mr. Zahn originated the

conceptual design for the current generation of control computers in service at all of the major hydroelectric projects operated by the Seattle District Army Corps of Engineers. However, he was not given credit for his suggestion. Mr. Zahn also came up with a very significant improvement in the operation of the project with a revised start/stop generator selection process based on unit efficiency. Although Mr. Zahn was not given credit, his idea was implemented as Station Standing Order 1-18. This single change in operations was estimated to improve plant production by more than 2%. As Chief Joseph Dam produces over 300 million dollars worth of electricity a year, implementation of this operational change results in a revenue increase of over 6 million dollars annually. And the concept works equally well at any hydro project with multiple generators so the operational change has since been implemented at all of the other applicable ACOE hydro projects.

For all of his years of good work Mr. Zahn was "rewarded" by being forced off the job. What the ACOE did to Mr. Zahn was about as wrong as wrong can be. He was discriminated against largely because agency management wrongfully believed that he had a drug and alcohol problem. As my personal notes of that time in early January of 2001 record, a telephonic conference was held regarding Mr. Zahn. In attendance at that conference were many of the agency department heads from both the Seattle District offices and Chief Joseph Dam. There was conjecture of workplace violence based upon Mr. Zahn's

diagnosed stress condition and supposed substance abuse problem. Although I stated at the time that I felt that there was no basis for such concern and that no threats or actions gave any such indication of potential workplace violence, the consensus of the group was to deny Mr. Zahn access to the project. My boss, Brian Applebury suggested that we make use of Mr. Zahn's doctor's letters by interpreting those letters in such a way as to justify issuing orders to Mr. Zahn not to come back to work. Obviously, I was not in a position to argue with my boss and so that is what was done. Mr. Zahn was not provided the agency's real reasons for the issuance of the "do-not-report-to-work" instructions and he was not given an opportunity to respond to any of these charges against him, nor was he represented by anyone. His supervisor did not speak up to state that Mr. Zahn had been conscientiously participating in an intensive two year rehabilitation program and had just successfully completed that program, or that he had evidenced no such indication of problems on the job and in fact Mr. Zahn had received a monetary award for his last contiguous period of work just prior to his taking a medical leave of absence.

Here I would like to go back to the start of things to address the issues with a perspective as to the human elements involved. My first indication of a problem was the grievance Mr. Zahn filed on the disparate assignment of overtime. The disparity was shocking considering Mr. Zahn's technical expertise compared to that of the favored recipient. The degree

of disparity made me feel uncomfortable because it was so blatant. In retrospect this was the point in time that I should have exerted strong guidance to Mr. Zahn's supervisor and directed corrective measures. Unfortunately, I relied upon the advice and input of people in Seattle and their management style was "us versus them". "Us" being management and "them" being the employees. Agency management perceived Mr. Zahn's grievance as challenging their right to assign overtime. Therefore management banded together to defeat the grievance without ever really considering the merits of the grievance. Mr. Zahn's immediate supervisor was relatively new to management and not at all inclined towards providing direction or effectively dealing with conflict. My thought at the time was that the favored recipient of the overtime assignments was taking unfair advantage of the lack of direction while Mr. Zahn came up short, one, because he asked for assignments, and two, because his supervisor was inappropriately concerned with a potential substance abuse problem even though Mr. Zahn was actively participating in a rehabilitation program. Mr. Zahn's problem never interfered with his work. I believe everyone deserves a second chance, but apparently some people don't. Mr. Zahn certainly wasn't given any such opportunity by the ACOE.

The administrative stance processing the overtime grievance was to give nothing up. At the first step, Mr. Zahn and Mr. Wilcox the UPTO union steward met with Chief of Operations John Skibby

and me. The grievance was denied outright and two week time limits were agreed upon for the continued processing of the grievance. This agreement was not kept by management and the second and third step agency responses were delayed and summary denials. Mr. Zahn was extremely stressed by this process and signed out on sick leave to seek medical help. Mr. Zahn's Doctor ordered a 45 day medical leave of absence for him. Management was surprised by Mr. Zahn's exit and concerned that this was some sort of tactic. Our first inclination was to deny sick leave and to abrogate any OWCP claim, but HR advised a more calm response and so we adopted a wait and see what happens approach. Things quickly became more complicated when Mr. Zahn filed several more complaints: a second grievance based on disparate treatment, an Unfair Labor Practice charging a unilateral downgrade of his office, and an EEOC complaint based on discrimination. These were followed by his OWCP claim. Mr. Zahn requested leave under the Family Medical Leave Act supplying his doctor's statements and a diagnosis of an anxiety disorder considered to have been incurred by management/ employee relations. There were also a couple of Freedom of Information Act requests. It was apparent that Mr. Zahn was suffering from a stress condition. I was certainly concerned that there were merits to these complaints from a long time valued employee. However, the Core's approach to complaints is to first deny them and if that doesn't work then to add delays and more layers of management

until the complainant wears out. This is a very effective approach in most cases.

Mr. Zahn came into my office one day in October of 2000 to ask about returning to work. I told him that I had no problem with him coming back to work, but that he needed to check with John Skibby. Mr. Zahn had also requested access to the Corps intranet and needed his updated password so I called Skibby's office to have him bring Zahn his password. Mr. Skibby soon arrived and the tension in the air between them was pretty obvious. After our conversation Mr. Zahn left and had a conversation with Mr. Skibby. As a result of that meeting letters requesting a medical release for return to work were put together with Seattle HR help and these letters were sent out the next day. That same day Mr. Zahn came out to talk to me and he was very visibly upset about these letters. He felt that management was trying to undermine his medical support and asked that these letters be rescinded and based on his obvious distress I agreed to send letters to rescind the first ones. As things developed, I was caught up with a number of things at the time and the advice I got from both HR in Seattle and Skibby was that we had a right to this information and that we should go ahead and let the first letters stand. I had intended to inform Mr. Zahn of my back stepping on our agreement, but being busy with other things and thinking things would work out for the best, I simply forgot.

Mr. Zahn called me one day in November of 2000 to request witness statements in support of his

OWCP claim. This seemed like a reasonable request to me so I agreed to supply a statement for him. He came in to collect the statement that I had typed up and we had a very pleasant conversation. During that conversation I advised Mr. Zahn that HR would be crafting a letter to restrict his access from the power house due to the apparent stress that it caused him and I also advised him that his request for FMLA leave was under consideration in Seattle. Following our conversation I again felt that things were working out and I began to have other statements requested by Mr. Zahn for his OWCP claim typed up and sent to other employees. I was subsequently advised by Terry Conover the Seattle HR person, Ron Marsh of the legal department, and Mr. Skibby that we should not be involved with the collection of witness statements and so we stopped doing it at that point. Then sometime about the first week of December of 2000 we received a letter from OWCP denying Mr. Zahn's claim. This letter seemed to say that Mr. Zahn's stress was not our fault so our consensus was to come up with a way to bring Mr. Zahn back to work. Working with John Skibby, Ron Marsh and Terry Conover we drafted a letter to inform Mr. Zahn that his FMLA leave had been used up and directed him to return to work by the 28th of December or provide medical validation for his continued absence or face removal from federal service. Coincident to the time, Mr. Zahn filed an EEOC complaint charging that management's failure to procure witness statements in support of his OWCP claim caused the denial of that claim and

that the personnel responsible for this retaliation were Mr. Skibby, Mr. Conover, and Mr. Marsh.

Mr. Zahn came into the Project on the specified deadline of December 28 and in my absence contacted Mark Jensen who was the acting project engineer that day. Mark called me at home and we held a teleconference. Mr. Zahn expressed willingness and a desire to come back to work and requested accommodations of flextime, some work from home and a change of supervisor. As a result of that meeting I directed Mr. Zahn into a transition back to work program where he would begin by catching up with his work email at the administration building in the morning, proceed to the powerhouse in the afternoon, and return to the administration building if he felt that he was under too much stress.

Mr. Zahn came to work on January 2, 2001 and supplied a letter from one of his doctors to me and we had a pleasant conversation and he worked throughout the day. The next day went in similar fashion and I issued a project-wide email welcoming him back to work. The 4th was the day of West Wilcox funeral. Zahn came to work that day and as most did went to the funeral in the afternoon where he and I had a conversation. He was concerned about his downgraded office and his non-working personal computer being retaliation. He also expressed that he felt Mr. Skibby had harassed him regarding where he had parked.

On January 5, 2001 HR Terry Conover emailed a number of people to attend a conference call later that same day. The number of people attending was much larger that I had expected and included LTC Holt, Brian Applebury Chief of Operations Div and Engineering, Mrs Anderson of the Commander's Office, Ron Marsh the attorney, Mrs Rose Espinoza of EEO, Terry Conover of HRO, and "Smokey" GSA regional security supervisor. Concerns and old stores about Mr. Zahn were shared. Most of those in Seattle felt immediate action was necessary even after I had stated that I had no knowledge of Mr. Zahn ever threatening or assaulting anyone. It was decided to immediately stop Mr. Zahn from coming back onto the Project, to collect his keys to the Project, to place an armed guard on the Project, and to contact the local Sheriff, Zahn's doctors, the union, and former Project Engineer in regards to Zahn. Too much information and too many people were involved and the results were pretty immediate. That night I received a call from Mr. Skibby to inform me that a guard had told him that we had fired Brian Zahn. I tried to relay the message that that wasn't true, but the grapevine is very quick in a small town and that was a bell that could not be unrung. On the 6th and 7th a draft of the do not report to work instructions was put together with the attorney Ron Marsh and HRO Terry Conover and then sent to Mr. Zahn via email and also by certified mail the following day.

In the day or so that followed union contract negotiations were being conducted and in the course

of those interactions the union president made an offer to travel to Bridgeport to talk Mr. Zahn into taking a medical retirement. Peter Gibson was involved and authorized travel expenses for the union president and vice president for this purpose. I told the UPTO Union President that I would support these efforts based on Mr. Zahn's 20+ years of service to the Project. On January 10, 2001 I made an agreement with UPTO, the specifics of which were detailed in an email titled "How I spent today's lunch break" and sent to Brian Applebury, Ron Marsh, Terry Conover, John Skibby and Mark Jensen. None of these people objected to the agreement. Conover offered some technical considerations to attend to, and Skibby asked that all of Zahn's grievances including any future grievances be made part of the agreement.

Mr. Zahn's status at the Project was an open secret and he was the subject of considerable gossip and speculation for weeks. He was rumored to have directly threatened Mr. Skibby and myself or written threats to us, but these rumors were not true. Nonetheless, there was considerable stress and concern expressed by employees and management personnel in regards to possible interactions with Mr. Zahn. Skibby even asked me if I would talk to my boss about a cash award as compensation for the stress he had been under because of Mr. Zahn.

Mr. Zahn's requests for accommodations were never really seriously considered. His requests for accommodations were discussed, but there was no

desire to accommodate him. Dr. Glen Frese was brought in to consult and advised re-alignment of the K-grades from Skibby's supervision to Mark Jenson's, but neither supervisor wanted the change in responsibilities. Mr. Zahn was not informed of this decision and he was not provided any written denial of his requests. There was considerable animosity directed at Mr. Zahn during this time. Conover, Marsh, Skibby and others made it very plain that Mr. Zahn's presence was not desired on the Project and their advice was that he should be fired, retired, or simply ignored. Zahn became the butt of emailed jokes sent between management.

In May of 2001, I met with Dr. Glen Frese and Mr. Zahn in Wenatchee at Dr. Frese' Office to see if there was any remedial action that we could take. Mr. Skibby had been asked to attend but found some excuse not to. Dr. Frese was quite upset that Mr. Skibby had decided not to attend and made the statement that Mr. Skibby's actions spoke volumes as to his lack of concern in resolving the issue. We had a frank discussion on the issues and I felt many valid points were made by Dr. Frese. At the end of the meeting I asked for some time to try and negotiate through the office politics and find some way to bring Mr. Zahn back to work. Unfortunately, my attempts were blocked by supervisory concern at the Project that Mr. Zahn's presence would be too disruptive. Finally, Mr. Zahn called me the first part of June 2001 for an update and I informed him that no accommodations would be forthcoming and again I

made the offer to support an application for disability retirement. Mr. Zahn accepted the offer and we processed his disability retirement.

The Corps' treatment of Mr. Zahn was really quite horrible. I have never seen an employee treated worse or for less cause. The Corps' personnel practices result in a terrible cost to individual people's health and finances. Corps management simply does not treat employees like they are fellow human beings. Management of the agency evidenced no compassion at all for Mr. Zahn. I regret much of my role in these events. In my defense I will say that I was the only management official that had enough human compassion to proactively support a disability retirement for Mr. Zahn so that he at least had some measure of support and something to show for his 20+ years service to the Project.

I can only add that I personally know how difficult it would be for Mr. Zahn to find another similar job. Bridgeport is a remote rural area and the few jobs of the type Mr. Zahn performed are not likely to be within commuting distance and any application that Mr. Zahn would make would be likely subject to an adverse or no recommendation from his former employer.

I, Edward J. Reynolds do hereby declare under penalty of perjury and before witnesses that the foregoing statement to the best of my belief is an accurate and true statement of the events described.

Signed Edward J. Reynolds

Date 12 MARCH 05

State of _____ Country of _____ City of _____

Witnessed by _____

Witnessed by _____

Notarized by _____

Notary Stamp _____

State of California County of
Contra Costa
Subscribed and sworn to (or affirmed)
Before me on this 12 day of Mar., 2005, by
Edward J. Reynolds
personally Known to me or proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

Signature Victoria Jones

(Seal)

[SEAL]	VICTORIA JONES Commission # 1839584 Notary Public – California Alameda County My Comm. Expires Dec 30, 2008